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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 TERRENCE SMITH,

7 Petitioner,

8 v.

9 STATE OF WASHINGTON,

10 Respondent.

Case No. C17-5680 RBL-TLF

REPORT AND
RECOMMENDATION

NOTED FOR JANUARY 5, 2018

11 INTRODUCTION

12 This matter has been referred to Magistrate Judge Theresa L. Fricke pursuant to 28
13 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Petitioner Terrence Smith is a state prisoner
14 currently confined at the Coyote Ridge Corrections Center in Connell, Washington. On August
15 24, 2017, Mr. Smith filed an application for leave to proceed in forma pauperis and a proposed
16 petition for right of review under 5 U.S.C. § 702, which appears to be a request for relief from a
17 state court judgment and sentence. *See* Dkt. 1. Mr. Smith presents no grounds for relief and does
18 not include a request to be released from custody. *Id.* The petition has not been served on
19 respondent. After careful review of the petition, and the balance of the record, this Court
20 recommends dismissing Mr. Smith's petition for failure to state a claim and for frivolousness.
21 *See* 28 U.S.C. §§ 1915(e)(2)(B), 1915A(b), 2244(a), Federal Rule of Civil Procedure ("FRCP")
22 12(b)(6).

23 DISCUSSION

24 In his petition, Mr. Smith identifies a November 18, 2014 conviction for robbery in the
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1 first degree; however, he does not identify a request to be released from custody. Dkt. 1. A
2 petition will be dismissed for failure to state a claim upon which relief may be granted if it
3 appears the “[f]actual allegations ... [fail to] raise a right to relief above the speculative level, on
4 the assumption that all the allegations in the complaint are true.” *Bell Atlantic, Corp. v. Twombly*,
5 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations omitted). That is, failure to
6 present enough facts to state a claim for relief that is plausible on the face of the complaint will
7 subject that petition to dismissal. *Id.* at 556.

8 A petition is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v.*
9 *Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Franklin v. Murphy*, 745
10 F.2d 1221, 1227-28 (9th Cir.1984). The Court may, therefore, dismiss a claim as frivolous where
11 it is based on an indisputably meritless legal theory or where the factual contentions are clearly
12 baseless. *Neitzke*, 490 U.S. at 327.

13 The Court must construe the pleading in the light most favorable to petitioner and resolve
14 all doubts in petitioner's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843, 23
15 L.Ed.2d 404 (1969). Although pro se petitions are to be liberally construed in a petitioner's favor,
16 conclusory allegations of the law, unsupported conclusions, and unwarranted inferences need not
17 be accepted as true. *Id.* While the Court can liberally construe a petition, it cannot supply an
18 essential fact an inmate has failed to plead. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir.1992)
19 (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir.1982)). Unless
20 it is absolutely clear that amendment would be futile, however, a pro se litigant must be given the
21 opportunity to amend his complaint to correct any deficiencies. *See James v. Giles*, 221 F.3d
22 1074, 1077 (9th Cir. 2000).

23 This does not appear to be a complaint under 42 U.S.C. §1983 or a habeas corpus petition
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1 under 28 U.S.C. §2254. Mr. Smith titles his filing “Right of Review under 5 U.S.C.S. § 702” and
2 not identify any allegations about conditions of his confinement, nor does he make a request to
3 be released from custody. Dkt 1. Rather, Mr. Smith seems to allege an amorphous financial
4 dispute under a form of contract theory. *Id.* Any amendment of his petition would be futile.

5 CONCLUSION

6 The Court recommends dismissing Mr. Smith's petition (Dkt. 1) with prejudice for failure
7 to state a claim and for frivolousness. *See* 28 U.S.C. §§ 1915(e)(2)(B), 1915A(b); FRCP
8 12(b)(b). The Clerk shall send a copy of this Order to Mr. Smith.

9 The parties have **fourteen (14) days** from service of this Report and Recommendation to
10 file written objections thereto. 28 U.S.C. § 636(b)(1); FRCP 6; FRCP 72(b). Failure to file
11 objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474
12 U.S. 140 (1985). Accommodating this time limitation, this matter shall be set for consideration
13 on **January 5, 2018**, as noted in the caption.

14 Dated this 19th day of December, 2017.

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17 Theresa L. Fricke
18 Theresa L. Fricke
19 United States Magistrate Judge
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